No. 83-2030

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

THE BOARD OF EDUCATION OF THE CITY OF OKLAHOMA CITY, STATE OF OKLAHOMA,
Appellant,

v.

THE NATIONAL GAY TASK FORCE,
Appellee.

On Appeal from the United States Court of Appeals for the Tenth Circuit

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BRIEF AMICUS CURIAE OF THE AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS

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December 26, 1984

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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This brief *amicus curiae* is filed on behalf of the American Association of University Professors with the consent of both parties.

INTEREST OF AMICUS CURIAE

The instant case raises central questions of the free speech rights of public employees, specifically primary and secondary school teachers in Oklahoma whose rights of public advocacy are impaired under the challenged statute. Founded in 1915, the American Association of University Professors (AAUP) is committed to advancing the standards, ideals, and welfare of teachers and research scholars in universities and colleges. The academic freedom and civil liberties of faculty members in

higher education are closely linked to those of teachers in primary and secondary schools, and the AAUP has often participated as *amicus curiae* in this Court in cases involving both settings.[1]

One of the AAUP's central tasks, frequently undertaken in concert with other national organizations, is the formulation of statements intended to establish minimum standards of institutional practice in higher education. Paramount among these is the 1940 *Statement of Principles on Academic Freedom and Tenure* (1940 *Statement*),[2] drafted jointly with the Association of American Colleges. The 1940 *Statement*, endorsed by over 100 learned societies and professional organizations, has guided faculties, administrators, boards of trustees, and courts in matters of academic freedom and tenure.[3] In the section on academic freedom, the 1940 *Statement* endorses the rights of college teachers as citizens:

> The college or university teacher is a citizen, a member of a learned profession, and an officer of an educational institution. When he speaks or writes as a citizen, he should be free from institutional censorship or discipline, but his special position in the community imposes special obligations. . . . [He] should

[1] *Minnesota State Bd. for Community Colleges v. Knight*, 104 S. Ct. 1058 (1984); *Board of Educ. v. Vail*, 104 S. Ct. 2144 (1984); *Arizona Governing Committee for Tax Deferred Annuity and Deferred Compensation Plans v. Norris*, 103 S. Ct. 3492 (1983); *Givhan v. Western Line Consol. School Dist.*, 439 U.S. 410 (1979); *City of Madison Joint School Dist. v. Wisconsin Employment Relations Comm'n*, 429 U.S. 167 (1976); *Perry v. Sindermann*, 408 U.S. 593 (1972); *Board of Regents v. Roth*, 408 U.S. 564 (1972); *Whitehill v. Elkins*, 389 U.S. 54 (1967); *Keyishian v. Board of Regents*, 385 U.S. 589 (1967).

[2] Reprinted in AAUP POLICY DOCUMENTS AND REPORTS 3 (1984). A copy of this volume has been lodged with the clerk.

[3] *See, e.g., Tilton v. Richardson*, 403 U.S. 672, 681-2 (1971); *Krotkoff v. Goucher College*, 585 F.2d 675 (4th Cir. 1978); *Adamian v. Jacobson*, 523 F.2d 929 (9th Cir. 1975).

> at all times be accurate, should exercise appropriate restraint, should show respect for the opinions of others, and should make every effort to indicate that he is not an institutional spokesman.[4]

The AAUP's 1966 *Statement on Professional Ethics*[5] similarly recognizes the rights of faculty members as citizens:

> V. As a member of his community, the professor has the rights and obligations of any citizen. . . .

[4] AAUP POLICY DOCUMENTS AND REPORTS 3-4 (1984). Further elaboration is found in an interpretive comment issued in 1940 by the framers of the 1940 *Statement* which indicates:

> If the administration of a college or university feels that a teacher has not observed the admonitions of Paragraph (c) of the section on Academic Freedom and believes that the extramural utterances of the teacher have been such as to raise grave doubts concerning his fitness for his position, it may proceed to file charges under Paragraph (a) (4) of the section on *Academic Tenure*. In pressing such charges the administration should remember that teachers are citizens and should be accorded the freedom of citizens. In such cases the administration must assume full responsibility and the American Association of University Professors and the Association of American Colleges are free to make an investigation.

In 1964, the AAUP's Committee A on Academic Freedom and Tenure issued a Statement on Extramural Utterances which provides *inter alia* that:

> The controlling principle is that a faculty member's expression of opinion as a citizen cannot constitute grounds for dismissal unless it clearly demonstrates the faculty member's unfitness for his position. Extramural utterances rarely bear upon the faculty member's fitness for his position. Moreover, a final decision should take into account the faculty member's entire record as a teacher and scholar.

AAUP POLICY DOCUMENTS AND REPORTS 4-6 (1984).

[5] AAUP POLICY DOCUMENTS AND REPORTS 133-4 (1984). The 1966 *Statement on Professional Ethics* was relied on recently in *Korf v. Ball State University*, 726 F.2d 1222, 1227 (7th Cir. 1984), a case upholding the dismissal of a faculty member for the sexual exploitation of students.

> When he speaks or acts as a private person he avoids creating the impression that he speaks or acts for his college or university.

We approach the Oklahoma statute in this brief from the standpoint of its seriously flawed restrictions on the extramural utterances of teachers. When public school teachers speak extramurally as citizens, their rights and obligations converge with those of faculty members as citizens.[6] By virtue of its long and active interest in the freedom of extramural faculty speech, the AAUP is well-qualified to address the Court as *amicus curiae*.

Restrictions on extramural advocacy by public school teachers are a source of special concern to faculty members for four reasons. First, history suggests that constraints initially intended to apply only to public school teachers are often extended to public colleges and universities. The teacher loyalty oath statutes enacted with frequency in the 1920s and 1930s applied in twenty-one states also to faculty members at public institutions of higher education.[7] The Massachusetts legislature purported to extend its loyalty requirement even to private higher education, reaching Harvard, M.I.T., and scores of other institutions.[8] The "anti-evolution" law invali-

[6] While the younger age of the students may justify placing greater limits on in-class speech by public school teachers than by faculty, *see, e.g., Widmar v. Vincent*, 454 U.S. 263, 274 n.14 (1981), we do not concede the constitutionality of the Oklahoma statute as applied to speech in the classroom.

[7] Edmund Reutter, THE SCHOOL ADMINISTRATOR AND SUBVERSIVE ACTIVITIES 68 (1951).

[8] *See*, Robert M O'Neil, *Academic Libraries and the Future: A President's View*, 45 COLL. AND RESEARCH LIBRARIES 184, 187-8 (May, 1984). O'Neil, president of the University of Wisconsin System, Madison, urges university librarians to champion intellectual freedom in the primary and secondary school libraries and public libraries. "Some recent initiatives of the moral majority have looked initially at problems in public school classrooms but have not been wholly unmindful of possibly fertile ground in higher education as well." *Id.* at 188.

dated by this Court in *Epperson v. Arkansas*, 393 U.S. 97 (1968), governed not only primary and secondary schools, but also state-supported colleges and universities. The limits imposed by Oklahoma on the advocacy of its public school teachers may well be extended in that state or elsewhere to faculty members. Second, links in employment may exist between faculty members and public school teachers. Some faculty members have taught, or intend to teach, in the secondary schools. A two-year community college may, for example, draw its faculty in part from the ranks of the public high school teachers.[9] Restrictions on public school teachers may discourage professors, and others, from teaching at the primary and secondary levels.

Third, colleges and universities are the training grounds for public school teachers. Faculty members offer values of intellectual inquiry and community participation to future teachers, lessons which may be rendered meaningless if state laws inhibit teachers from public advocacy on particular subjects. The Oklahoma statute at issue, moreover, covers even student teachers, who are advanced undergraduates performing supervised classroom teaching in partial fulfillment of their degree requirements. Supervising faculty members may have to counsel student teachers about the statutory restrictions on advocacy. And fourth, primary and secondary school teachers, as citizens, share with faculty a special perspective enriching their public comments on matters dealing with education. For these reasons, the AAUP partici-

[9] In an employment discrimination dispute involving a faculty member from Harris-Stowe State College in Missouri, the district court observed:

> Many faculty members, including the plaintiff, followed a career path through a tenured position with the St. Louis Public Schools to a position in Harris-Stowe.

Leftwich v. Harris-Stowe State College, 540 F. Supp. 37, 39 (E.D. Mo. 1982), *rev'd in part*, 702 F.2d 686 (8th Cir. 1983).

pates as *amicus curiae* in support of the decision of the court of appeals in this case.

STATEMENT OF THE CASE

The National Gay Task Force challenges the constitutionality of OKLA. STAT. tit. 70 § 6-103.15 (Supp. 1984). The statute countenances the dismissal of public school teachers, student teachers, and teachers' aides who, *inter alia*, advocate, encourage, or promote "public or private homosexual activity." If the advocacy is conducted publicly, i.e., in a manner creating a substantial risk that fellow employees *or* school children will become aware of it, then the employee may be dismissed as "unfit." Applicants for employment as teachers, student teachers, or teachers' aides may be rejected on the same basis.

The district court found no constitutional infirmities in the statute, concluding that it did not infringe protected privacy interests, violate the Establishment or Equal Protection clauses, or suffer from vagueness or overbreadth problems under the First Amendment. The court of appeals reversed in part, finding that the statutory prohibition on advocacy, along with the similar prohibitions on encouragement and promotion, was overbroad. It severed these three words from the remainder of the statute. *National Gay Task Force v. Board of Education of the City of Oklahoma City*, 720 F.2d 1270 (10th Cir. 1984).

SUMMARY OF ARGUMENT

The Oklahoma statute under challenge is defective in its flat prohibition of "advocacy" concerning homosexuality. The restriction applies most significantly to extramural speech in the public arena by teachers and prospective teachers. It inhibits all expressions, whether scholarly, artistic, or political, which might be construed as favorable to homosexuality and which might reach the

public. The fact that advocacy concerning homosexuality may address sodomy, which is a crime, does not save the statute from First Amendment infirmity. Nor do the "unfitness" factors narrow the statute. The factor looking to "adverse effect" on school employees or children utterly disregards the fact that meaningful expression challenging the status quo may often cause discomfort to the listener. Tests under the First Amendment, however, cannot judge extramural utterances on matters of public concern on the basis of the acceptability of the speakers' views. The statutory factor looking to the tendency of the advocacy to encourage similar conduct in the young is circular in its reasoning and ill-conceived in its definition. In punishing a teacher's extramural advocacy which tends to encourage advocacy, as opposed to homosexual acts, in the young, the statute simply multiplies its vagueness and overbreadth. While the state has a legitimate interest in protecting children, the Oklahoma Act extends far beyond this purpose in its broad restraints on extramural advocacy. The advocacy need not, by definition, even be likely to come to the attention of children. We urge affirmance of the decision of the court of appeals, which severed "advocating . . . encouraging or promoting" from the statutory definition of "public homosexual conduct."

I. The Instant Statute's Prohibition of "Advocacy" Is Unconstitutionally Vague.

The instant statute proscribes certain kinds of "advocacy" on pain of loss of current or future employment. The prohibited expression is "advocacy" of "public or private homosexual activity" which "advocacy" bears a substantial risk of coming to the attention of students or school employees—that is, advocacy of a public character. In addition, the state has attached four conditions upon which appointment may be denied or terminated for such expression. Two of these bearing special attention

are addressed in the following section. Here we examine the general restriction on "advocacy," and in particular its effects on extramural expressions of current and prospective teachers.

The proscription of "advocacy" is not a novel question for this Court. The prohibition of the employment of teachers and professors who "advocate" disfavored ideas has been condemned on the grounds advanced here—the failure to inform the teacher or professor what is forbidden. *Baggett v. Bullitt*, 377 U.S. 360 (1964), *Cramp v. Board of Public Instruction*, 368 U.S. 278 (1961). The further evil in such a scheme is that it inhibits the exercise of individual freedom. Students, teachers, and professors, having to guess at its meaning, necessarily will "tend to steer far wider of the unlawful zone." *Speiser v. Randall*, 357 U.S. 513 (1958).

The loyalty and anti-subversion cases challenging legislation restrictive of teachers' rights of advocacy[10] culminated in *Keyishian v. Board of Regents*, 385 U.S. 589 (1967). There the Court struck down a New York law, similar in operation to the instant Oklahoma statute, which disqualified from the civil service and from employment in the educational system "any person who advocates the overthrow of government by force, violence, or any unlawful means, or publishes material advocating such overthrow. . . ." 385 U.S. at 593. The dismissal statute referred to the penal code to define the nature of sedition, treason, and criminal anarchy, just as the Oklahoma statute at issue incorporates by reference the state anti-sodomy law in attempting to specify "public homosexual activity." The vagueness of the proscription on "advocacy" was central to the Court's invalidation of the New York statute.

Under the Oklahoma scheme, what is the teacher or prospective appointee forbidden publicly to say? Could

[10] *See* R. Brown, Loyalty and Security (1958); *Shelton v. Tucker*, 364 U.S. 479 (1960).

she advocate, for example, the decriminalization of consensual adult homosexual relationships? The Board of Education argues that public advocacy of legal change is not proscribed by the law. Brief of Appellant at 33. But such limitation is not at all apparent from the face of the statute, for advocacy of decriminalization surely incidentally encourages some to engage in the conduct made criminal, and that, argues the Board, is what the Act does proscribe. Justice Rutledge observed this phenomenon dissenting in *Musser v. Utah*, 333 U.S. 95, 101 (1948):

> It is axiomatic that a democratic state may not deny its citizens the right to criticize existing laws and to urge that they be changed. And yet, in order to succeed in an effort to legalize polygamy it is obviously necessary to convince a substantial number of people that such conduct is desirable.

Even if advocacy of legal change alone is carved out as a narrow exemption to the Act, change in law presupposes and flows from an attitudinal change on the part of the body politic. And advocacy of attitudinal change would seem rather clearly to be reached by the Act. Such calls can be made not only in public polemics, but in works of serious scholarship, art, and literature, all of which would be proscribed by the instant Act if the content is taken by public school officials to smack too much of "advocacy." Is *Uncle Tom's Cabin* a form of "advocacy"? Does *Inherit the Wind* "advocate" academic freedom? Is *The Children's Hour* too sympathetic and so too "encouraging" of its protagonist, Martha Dobie, a lesbian schoolteacher hounded to suicide by public bigotry and personal guilt?

The dilemma for teachers contemplating extramural utterance posed by the vague proscription of "advocacy" mirrors that of the university students who are prospective teachers, and their faculty advisors. The serious undergraduate or graduate student will routinely en-

counter homosexual themes and overtones in the study of literature and art, in sociology, anthropology, psychology, and, especially with the rise of politically active homosexual groups, in political science. The student would be expected to address these matters in classroom discussion and supervised research, and could also wish to speak on them in extra-curricular activities.

To be sure, the instant statute requires examination of the manner of the utterance; that is, whether it creates a "substantial risk" of coming to the public school's attention. Thus the serious university student is told, in effect, that she may research upon homosexual themes in academic disciplines; but she may not broadcast the results of her research "too" widely, nor give "too" public an exposure to her work, for fear that her words may come to the attention of prospective employers and be taken as impermissible "advocacy" if her conclusions are too supportive or "encouraging" of homosexual relationships.

Quite plausible hypotheticals about the limits of "advocacy" in the university by prospective teachers come readily to mind.[11] Should an education major publish a book or article about the status of homosexuals in America? Should she write a review sympathetic to the portrayal of Martha Dobie in a theatrical production of *The Children's Hour*? Should she participate in a debate on gay rights? How should a faculty member advise a student contemplating these activities?

The Oklahoma law breathes no hint of an answer to the most obvious situations of the Act's immediate application on campus. Nor can this Court say with any

[11] An actual example may be found in *Academic Freedom and Tenure: Broward Junior College (Florida)*, 55 AAUP BULL. 71, 76 (1969) (Instructor who did not practice homosexuality but who expressed the opinion, in the question portion of a public lecture open to students, that homosexuals were human beings who should be tolerated, was denied reappointment for the expression of "beliefs contrary to accepted social patterns" at the college).

assurance that such activity is not reached by the Act. The student teacher, education major, their faculty advisors, as well as current teachers, are left entirely to guess at what is proscribed.

The consequences are those this Court adverted to more than twenty-five years ago in *Speiser v. Randall*, supra. The conscientious individual, incapable of ascertaining where the line is to be drawn, must tend to steer far wider of the unlawful zone. This consequence will directly affect institutions of higher education, for it contributes to a dampening of robust student debate, scholarly exploration, and even extra-curricular activity on the part of those considering the prospect of employment in Oklahoma's public schools. The extramural utterances of individuals currently employed as teachers are likewise impaired.

II. The Key Statutory "Limitations" Are No Limitations At All.

The Board of Education argues that the instant Act is saved because the legislature has appended additional limitations that supply a sufficient "nexus" between "advocacy" and professional fitness, allegedly consistent with this Court's holding in *Pickering v. Board of Education*, 391 U.S. 563 (1968). Upon examination, two key such limitations, the requirement of "adverse affect" and the requirement that the speech tend to "encourage" students to similar conduct, turn out to suffer from the same infirmities of vagueness and overbreadth which mar the proscription of "advocacy."

A. The Requirement of "Adverse Affect" Is Unconstitutionally Vague.

What is the "adverse affect" upon students or coworkers that permits the State to disqualify a prospective teacher from engaging in otherwise protected speech? The

Board of Education does supply a refinement—and it should give pause:

> Teacher advocacy . . . . [w]hen it comes to the attention of students, given the significant "role model" function which teachers are called upon to perform, it is likely to engender disrespect for law as an institution, the social responsibilities of citizenship, *and* the political governmental process as a whole. This is true, of course, even if imminent lawless action is not produced. When it comes to the attention of other teachers or co-workers, it is likely to produce sufficient controversy, suspicion, and mistrust so as to threaten employee discipline, co-worker harmony, and that personal loyalty and confidence requisite to particularly close employee relationships.

Brief of Appellant at 34-5 (emphasis in original). Of primary concern here is the proposed test of "controversy" to one's co-workers and superiors as working a constitutionally sufficient "adverse effect."

The Board of Education argues that the proposed test is supported in this Court's decision in *Pickering*. Amicus AAUP respectfully disagrees. In *Pickering*, this Court indicated that the interests of the State as employer in regulating the speech of its employees differ from its interests in regulating the speech of the citizenry at large—and that a balance needs be struck. Id. at 568. The state's interest lies in promoting the efficiency of the public service, *id.*, which the Court identified as being served by maintaining "discipline by immediate supervisors" and "harmony among co-workers." *Id.* at 570. *See Connick v. Meyers*, 461 U.S. 138 (1983). Importantly, the Court has declined to accept the accusation that the fomenting of "controversy" in commenting upon a matter of public interest *simpliciter* disserved the state's interest in maintaining an efficient school system. In *Pickering*, the Court rather clearly signaled that the state interest in discipline and harmony is not validly implicated by speech

directed to general matters of public concern. The status and rights of homosexuals are plainly matters within the sphere of current public concern.[12]

What the Board of Education advances here, therefore, is a constitutionally stunning proposition: that the otherwise protected speech of a prospective teacher, and the extramural speech of a current teacher, may be relied upon to deny or terminate employment if it is sufficiently controversial to produce "disharmony" among co-workers.[13]

At one sweep all the law this Court has announced with respect to the expressive rights of teachers and professors is reduced to an irrelevance. An advocate upon any controversial subject could be disqualified not because the speech fell afoul of any test of lawlessness, not because

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[12] *See, e.g.*, R. Rivera, *Recent Developments in Sexual Preference Law*, 30 DRAKE L. REV. 311 (1980-81); *Developments in the Law: Public Employment*, 97 HARV. L. REV. 1611, 1754 n.83 (1983); Note, *Free Speech Rights of Homosexual Teachers*, 80 COLUM. L. REV. 1513 n.7 (1980); Note, *The Right of Privacy and Other Constitutional Challenges to Sodomy Statutes*, 15 U. TOL. L. REV. 311 (Winter 1984); Note, *The Rights of Gay Student Organizations*, 10 J. COLL. & UNIV. L. 397 (Winter 1983-84). The AAUP has condemned discrimination against faculty members on the basis of sexual or affectional preference. 1976 *Statement on Discrimination*, AAUP POLICY DOCUMENTS AND REPORTS 73 (1984).

[13] As Edward C. Thorndike put it:

> A controversial subject oftenest means one where the opinions of fairly competent persons differ and are held with some pertinacity and vehemence. It is used especially where the division of opinion relates to matter of acknowledged public concern, such as, in the past, Protestantism, witchcraft, the divine right of kings, slavery, property requirements for suffrage, or free schools. Among such, now, are tariffs, government ownership of public utilities, international court, the New Deal, divorce, sterilization of idiots, insane, and criminals of certain sorts. . . . More broadly, a controversial subject is any that causes conflict or dispute, even though all the really competent persons are on one side, even though the conflict is

it reflected any want of scholarship, and not because it lacked in moderation or restraint in any way, but because one's prospective colleagues or superiors found the advocate's position upon a general question of public policy too "controversial" and so "disharmonious." But to make appointment contingent upon the degree of approval of one's social, economic, or political views by one's co-workers or supervisors is to eviscerate the First Amendment.

Suffice it to say, as this Court did in *West Virginia Board of Education v. Barnette*, 377 U.S. 624, 683 (1943) (emphasis added):

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, *to free speech*, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.

Neither does one's exercise of free speech upon a general question of public policy depend upon the majority sentiment of one's co-workers or administrators.

To be sure, as the Board of Education stresses, the instant statute concerns advocacy bearing upon conduct currently declared to be criminal. Although that does narrow the range of possible governmental proscription, it is qualitatively no limitation at all. The criminalization of the conduct only reflects the fact that there are very deeply held societal views concerning it, and any challenge to those views is likely to be highly "controversial." The deficiency of reliance on the criminal nature of

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waged with restraint and urbanity, even though the subject is caviar to the general.

E. Thorndike, THE TEACHING OF CONTROVERSIAL SUBJECTS 1-2 (1937).

sodomy can be illustrated by returning to an Oklahoma criminal law of some years ago and substituting the reference of that law in the template afforded by the instant Act. Under Oklahoma Stat. 1931, ch. 13, § 1677, miscegenation was prohibited. Anyone who married in violation of the law was guilty of a felony. *Id.* § 1678. Anyone who performed the ceremony was guilty of a felony. *Id.* § 1679. Even the clerk who issued a license was guilty of a misdemeanor. *Id.* § 1680. The statutory scheme leaves no doubt about the deeply felt societal values of the time. Could not the state have thus enacted a law, anticipating the instant one verbatim, prohibiting "public miscegenetic conduct" defined as "advocating, soliciting, imposing, encouraging, or promoting public or private miscegenetic activity in a manner that creates a substantial risk that such conduct will come to the attention of school children or school employees" and subject to the same limitations as the instant Act? The authorship of plays, books, or articles commending, condoning, or tolerating racially mixed marriages would certainly have been sufficiently disquieting so to justify the exclusion of an otherwise qualified individual from employment. Once the Court accepts the idea that teachers can be prohibited from advocacy so long as the advocacy touches upon currently declared criminal conduct then, to a large extent, the resulting constitutional rule is that the social status quo can occasion no utterance for change if one desires to be a public school teacher.

In sum, the fact that the proscribed utterance deals with conduct that is at once criminal and controversial supplies no guidance about what may be said without crossing the line. On the contrary, inasmuch as the permissibility of the utterance may turn upon the subjective reaction of unknowable prospective co-workers, the standard to which one must adhere is unknowable virtually by definition.

B. The Requirement that the Speech Must "Tend to Encourage" is Unconstitutionally Vague.

The solicitation of students to engage in a homosexual relationship with the solicitor is plainly impermissible conduct, as the Court of Appeals held; and so it is important to stress that the "encouragement" requirement applies to limit otherwise protected public advocacy. But what is it the speech must tend to encourage? "Similar conduct" says the law. But "conduct" is defined by the law as "advocacy." So all the infirmities in the proscription of advocacy are merely reincorporated into the ostensible "limitation."

This limitation to "encouragement" is susceptible of two interpretations. Under the first, scrutiny must be given to the frequency or repetition of the utterance. Has it been said often "enough" to dispose students to similar views? Presumably, a single favorable review in the local press of a book, play, or motion picture with a homosexual theme would be *de minimis*—though we cannot know; but if it is, at what point is the prospective teacher to know that she has crossed the line so to be disabled from appointment? And an unascertainable standard will surely discourage individuals from reviewing such works at all no matter how widely read, praised or condemned they are elsewhere.

Alternatively, this "limitation"—read in conjunction with the threshold requirement of "advocacy"—requires scrutiny not only of the quantity of utterance but of its quality; that is, whether it is of a nature effectively to sway student opinion or belief. By this reading, the statute would allow a school board to refuse to hire a graduate not because she wrote a series of essays that engendered controversy alone, but because the content of the essays additionally might dispose students to similar

expression—that is, whose arguments were compelling or whose style seemed persuasive.

If this is what the statute means, one who "advocates" weakly or badly may be hired; one who does so powerfully or skillfully may not. By this Orwellian device, the unpersuasive or foolish advocate would meet the statutory test of professional fitness, while the persuasive or powerful advocate would be professionally unfit.

It suffices to say that an assessment of likely impact is a matter of rhetorical taste or political sensibility. Accordingly, this seeming "limitation" supplies no standard to guide the current or prospective teacher about what may be published or said.

III. Legitimate State Interests in Protecting Children Do Not Justify the Statute's Broad Restraints on Extramural Expression.

The Oklahoma statute was passed without the recording of legislative history and so one can only speculate on its purposes. The Brief of Appellant Board of Education suggests four concerns to which the statute was directed:

1. avoiding disruption in the schools;
2. preventing school children from committing homosexual sodomy;
3. fostering children's normal process of social integration; and
4. assuring that children develop attitudes of respect for the law.

Brief of Appellant at 29-30. With respect to the first, the potentially disruptive effects, if any, of extramural expressions by teachers may be dealt with under the comprehensive Oklahoma teacher dismissal statute, OKLA. STAT. ANN. tit. 70, § 6-103(A) (Supp. 1984). The statute directed to teachers' homosexual activity and conduct is repetitive of the general teacher dismissal statute, and indeed has never been utilized. To the extent that the

state seeks to preserve order in the schools by dismissing disruptive teachers, § 6-103(A) can comprehensively achieve this purpose.

The three other purposes proffered by the board of education concern the well-being of children. The statutory language, however, goes beyond children's interests and evinces a constitutionally unjustifiable solicitude for the sensibilities of a teacher's fellow employees. Both the definition of "public homosexual conduct" and the first "unfitness" factor can be satisfied by advocacy likely to come to the attention only of school employees, or which "adversely affects" school employees. It is curious indeed that a statute directed to protecting children's interests concerns itself so extensively with other adults. The statute's potential for punishing extramural utterances not even heard by children, nor adversely affecting them, casts serious doubt on the assumption that its major objectives are directed to protecting the young.

Assuming, however, that the statute advances children's interests, this purpose cannot serve as a valid basis for broad constraints on extramural speech by teachers. Justice Frankfurter emphasized this in *Butler v. Michigan*, 352 U.S. 380 (1957), writing for the Court in striking down a state law prohibiting the possession or distribution of printed material tending to corrupt the morals of youth or incite them to "depraved" acts:

> The State insists that, by thus quarantining the general reading public against books not too rugged for grown men and women in order to shield juvenile innocence, it is exercising its power to promote the general welfare. Surely, this is to burn the house to roast the pig.

352 U.S. at 383. The same principle underlay the majority opinion in *Carey v. Population Services*, 431 U.S. 678, 701 (1977), where the state assertion that the advertising of contraceptives would encourage the young toward illicit sexual behavior was considered an insufficient basis for a total ban on advertising. The statute here

can punish speech at least as unlikely as the advertisements in *Carey* to promote sexual behavior in children. While the separate opinions in *Carey* by Justices White, Powell, and Stevens acknowledge that carefully tailored restrictions might appropriately protect youth or curtail offensive speech in some ways, the Oklahoma statute is not so limited. It broadly restricts "advocacy," including extramural utterances, and looks to a generalized "adverse affect" on school employees or children. Once again the house has been burned to roast the pig.

Accordingly, we submit that the court of appeals correctly severed the terms advocacy, encouragement, and promotion from the Oklahoma statute. By this modest and constitutionally-compelled change, the extramural expressive rights of teachers are preserved. The mere assertion that the statute is intended to protect the young cannot alone serve to defeat countervailing central First Amendment values.

CONCLUSION

The Board of Education contends that the instant statute is justified by the need to insulate the schools from an atmosphere of "disharmony, suspicion, and mistrust" flowing from speech that is controversial but otherwise permissible under settled constitutional principles. Amicus AAUP can readily conceive of how retention of a teacher with dissenting sexual-social views can engender disharmony with a majority of co-workers of a contrary view. But the resulting "disharmony" is no different from the disharmonies that flow from the heterogeneity of social, economic, religious or political views that citizens are free to espouse. Government can no more disfavor the employment of a teacher because a majority of her co-workers dislike her views on homosexuality than it can deny employment to a teacher because a majority of her co-workers dislike her views on capital punishment, public ownership of the means of production, or transubstantiation.

However, amicus AAUP does believe that suspicion and mistrust are indeed implicated by the instant Act—for it is the statute that will engender those consequences. Teachers in Oklahoma's public schools, and university students contemplating that career, are now suspect in their beliefs and expressions about a currently controversial social question. They must now be concerned about what they say or write, that their scholarly, journalistic, novelistic, or extracurricular projects may be measured by an unascertainable standard of "advocacy" and "controversiality" so to deny them employment in the public schools.

For the foregoing reasons, the judgment of the court of appeals severing "advocating . . . encouraging or promoting" from the definition of "public homosexual conduct" in OKLA. STAT. tit. 70 § 6-103.15(A)(2) should be affirmed.

Respectfully submitted,

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December 26, 1984